NO. 89-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

URQUHART & HASSELL,
Petitioner

v.

CHAPMAN & COLE, C.C.P., LTD.
AND NORMAN EHRENTRAUT,
Respondents

RESPONDENTS CHAPMAN & COLE AND C.C.P., LTD.'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Should the Fifth Circuit Court of Appeals decision affirming Fed. R. Civ. P. 11 sanctions imposed against a law firm for, *inter alia,* withholding material evidence after it had been requested, filing a frivolous RICO lawsuit as a defensive measure to "bludgeon the Plaintiffs into submission," failing to conduct any reasonable factual investigation before deciding to file a RICO lawsuit and intimidating non-party fact witness with threats of lawsuits be reversed?[1]

1. After Petitioner's Motion for Rehearing *en banc* to the Fifth Circuit was denied, Petitioner's clients, Itel, *et al* paid the full amount of the judgment and the full amount of their portion of the sanctions award to the Respondents, and therefore are no longer a part of this appeal.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certify that the following persons have an interest in the outcome of this Petition:

Petitioner:

URQUHART & HASSELL

W. James Kronzer of the firm of
Law Offices of W. James Kronzer
of Houston, Texas

Respondents:

CHAPMAN & COLE
C.C.P., LTD.

Mr. J. Douglas Sutter of the firm
of Griggs & Harrison of Houston, Texas

NORMAN EHRENTRAUT

Mr. Fritz Barnett, Esq. of the firm of
Glickman & Barnett of Houston, Texas

J. DOUGLAS SUTTER

EXPLANATION OF RECORD AND TRANSCRIPT REFERENCES

Throughout this Brief, references to the Record and Transcript will be made as follows:

(Vol. ____, p. ____)

References to the Transcript of the show cause (sanctions) hearing that occurred on May 11, 1987 will be made as follows:

(S.C.T. p. ____)

The page number will be that appearing on the page in the designated volume of the Record and Transcript.

Throughout this Brief, ITEL CONTAINERS INTERNATIONAL CORPORATION and ITEL CONTAINER INTERNATIONAL, B.V. shall be referred to as "ITEL." Respondents CHAPMAN & COLE and C.C.P., LTD. shall be referred to as "Chapman & Cole."

SILVIA T. HASSELL and EDWARD D. URQUHART shall be referred to alternatively as "ITEL's trial counsel," "Urquhart & Hassell," or by their individual names. Third-Party Defendant NORMAN EHRENTRAUT shall be referred to as "Ehrentraut."

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To The Honorable Supreme Court of the United States:

Respondents Chapman & Cole and C.C.P., Ltd. submit this brief in support of their request for affirmance of the opinion and order of the United States Court of Appeals for the Fifth Circuit and that the Order of the District Court be affirmed.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 865 F.2d 676, and is reprinted in the Appendix to the Petitioner's Brief, p. 1a.

The Memorandum and Order of the United States District Court for the Southern District of Texas is reported at 116 F.R.D. 550, and is reprinted in the Appendix to Petitioner's Brief, p. 31a.

STATEMENT OF THE CASE

Proceedings, Disposition in the Trial Court and Statement of the Applicable Facts.

Because the Statement of the Case presented by the Petitioner is so distorted, Respondents are compelled to provide the Court with an accurate Statement of the Case. This is a Petition for A Writ of Certiorari by Urquhart & Hassell, attorneys for the Defendants below, from the trial court's Order imposing sanctions upon them. (Vol. I, p. 110) The Petitioner's statements with respect to the individual lawyers' previous history involving Rule 11 Sanctions are not a part of the Record. Mr. Edward D. Urquhart chose not to take the stand in the show cause hearing which was held by the trial court to determine if Rule 11 Sanctions should be entered, but rather, allowed his associate, Ms. Silvia T. Hassel to testify.

Petitioner never mentioned in its Brief that its client, Itel, designed the container yard in question, approved of all construction plans and deceived the Respondents as to the true weight of the equipment to be utilized and the maintenance of the yard. As a proximate result thereof, the yard collapsed and Itel walked off without

paying rent or repairing the extensive damages it caused. For these, and other reasons, the trial court entered a substantial final judgment against the Petitioner's clients, Itel, *et al.* (Vol. 20, p. 273)

Some three months after the conclusion of trial and two months after a show cause hearing, the trial court sanctioned counsel for, *inter alia,* filing and màintaining a frivolous complaint under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 [hereinafter "RICO"], for concealing material evidence in violation of discovery obligations and for misleading the trial court and opposing counsel. To understand the imposition of sanctions, it is necessary to review the stages of investigation and discovery in this case. This Court should note the repeated warnings about sanctions that Urquhart and Hassell received from the trial court and from the opposing parties and their counsel.

1. Filing of the initial pleadings.

On November 22, 1982, Chapman & Cole sued ITEL. (Vol. 12, p. 2481). Chapman & Cole alleged that ITEL had breached a written lease, abused the leased property, and intentionally destroyed portions of the flexible surface and the maintenance building.

On December 27, 1982, ITEL filed its Original Answer and Counterclaim. (Vol. 12, p. 2470). It alleged that Chapman & Cole was liable for breach of contract, breach of warranty and misrepresentation. On July 27, 1983, ITEL filed its Motion for Leave to File Supplemental Counterclaims (*Id.*, p. 2375), which included a private cause of action under the Texas Deceptive Trade Practices - Consumer Protection Act. Tex. Bus. & Comm. Code Ann. §§ 17.12, *et seq.* (Vernon Supp. 1984) (hereinafter

the "DTPA"). (Vol. 12, p. 2381). The trial court granted ITEL leave to amend its pleadings. (Vol. 12, p. 2367).

2. Silvia Hassell's clandestine taping of a conversation with witness John Montgomery.

On June 9, 1983, Silvia Hassell telephoned John Montgomery. Montgomery was the architect who had originally prepared and revised ITEL's plans for the facility. At the time of the telephone call, Montgomery was a third party witness. (Vol. 2, p. 360).

Hassell began the conversation by telling Montgomery that she wanted him to tell her what he knew about the construction site. Montgomery told Hassell that he had only been at the site on one occasion, when he visited the wooded, pre-construction area. (S.C.T. p. 71). After Hassell asked about the facility, Montgomery told her that "he had heard rumors" (*Id.*, p. 71) and "hearsay" (*Id.*, p. 72) about problems there. Hassell did not ask Montgomery about "the dates, the times, the people and the circumstances [under which he had] heard these alleged rumors." (*Id.*, p. 73).

Hassell did not advise Montgomery that she was taping the conversation. (*Id.*). During the four years between the taping of that conversation and the trial, neither ITEL nor its trial counsel advised Montgomery, opposing counsel or the trial court of the clandestine taping even though Defendants' formal discovery requests clearly included such a thing. (S.C.T. p. 108; Vol. 2, p. 360).

3. The filing of ITEL's RICO lawsuit against Norman Ehrentraut.

Urquhart took Ehrentraut's deposition on May 30, 1984. (Vol. 10, p. 2255). The trial court gave ITEL

additional time to conduct discovery and decide whether it needed to file a third party complaint against Ehrentraut. (Vol. 10, p. 2068). On April 13, 1984, the trial court complied with ITEL's request and ordered Ehrentraut to produce all of his personal and business checking account records. Those bank records covered the period from one month before Ehrentraut began his involvement with the ITEL project until one month after the conclusion of his employment with Chapman & Cole. (Vol. 11, p. 2262).

On July 5, 1984, District Judge Norman Black entered a docket order that permitted ITEL to file a motion for leave to add Ehrentraut as a third party defendant before July 31, 1984. (Vol. 11, p. 2203). Instead of filing the proper Rule 14(a) motion for leave, ITEL simply filed its third party complaint and served Ehrentraut. (Vol. 11, p. 2154).

Ehrentraut filed a Rule 12(b) motion to dismiss. (Vol. 11, p. 2184). In that motion, Ehrentraut requested the trial court to award him "the expenses and attorney's fees he has incurred as a result of the filing of this Complaint and service of process" under Rule 11, Fed. R. Civ. P. (Vol. 11, p. 2184). The trial court ruled that Ehrentraut's motion was moot because ITEL had failed to file the proper motion by July 31, 1984. (Vol. 11, pp. 2153-2154). Thereafter, ITEL filed a motion to "bring in third party defendant beyond deadline to join additional parties." (Vol. 11, p. 2091). Because the trial court accepted ITEL's explanation that its failure to file the proper Rule 14(a) motion had resulted from "an honest mistake," the trial court allowed ITEL to prosecute its RICO lawsuit against Ehrentraut. (Vol. 10, p. 2069).

Judge Black also denied Ehrentraut's motion to dismiss. (*Id.*). The trial court refrained from granting the motion because of the case law that makes even the dismissal of "a claim on the basis of unsubstantiated allegations in a skeletal pleading" a "precarious disposition with a high mortality rate." (Vol. 10, p. 2070). Because Judge Black was "not convinced beyond a doubt that [ITEL could] prove no set of facts in support of its RICO claim," he declined to grant Ehrentraut's motion to dismiss and for sanctions. (*Id.*, pp. 2070-2071). Judge Black never commented on ITEL's ability to prove its case as Petitioner Urquhart & Hassell would have this Court believe. (Petitioner's Brief at pp. 8, 26).

In the RICO claim, ITEL alleged that Ehrentraut had conducted activities on the ITEL site through a pattern of racketeering activity. (Vol. 10, p. 2099). The Complaint alleged that Ehrentraut solicited and took bribes from subcontractors (specifically Ed Novotny, the slab/building contractor) employed in the building of the facility. (*Id.*). Chapman & Cole and ITEL were Ehrentraut's purported victims. In his Answer and Counterclaim, Ehrentraut requested attorney's fees pursuant to Rule 11. (Vol. 10, p. 2063).

4. The conduct of discovery in the trial court during 1984 and 1985.

The Record reflects a large number of discovery disputes. On October 21, 1983, Chapman & Cole filed a Motion to Compel Answers to Interrogatories to obtain information about the facts supporting ITEL's DTPA allegations. (Vol. 12, p. 2333). On February 2, 1984, Chapman & Cole filed a Motion to Compel and for Sanctions because ITEL had not provided the information

describing the factual basis for its DTPA counterclaims. (Vol. 11, p. 2281). On June 7, 1984, Chapman & Cole filed a Motion for Contempt and Sanctions. (*Id.*, p. 2236). That motion discussed alleged discovery abuses of ITEL which centered around the DTPA counterclaims. (*Id.*). On August 17, 1984, Chapman & Cole filed its Third Motion to Compel and for Sanctions which described additional discovery abuses that also pertained to ITEL's DTPA counterclaims. (*Id.*, p. 2187).

The most revealing dispute involved problems arising from ITEL's production of documents reflecting the volume of ITEL's container business at the facility in 1981. Chapman & Cole requested the records that reflected the total number of containers stored on the facility. (*Id.*, pp. 2236-2240). Urquhart and Hassell required Chapman & Cole's counsel to review the documentation at their offices. (Vol. 8, pp. 7-8). When Chapman & Cole's counsel arrived, Hassell gave him three pages of documents. Those three pages purportedly reflected the thousands of containers that had been on the site during ITEL's possession of the premises. (*Id.*, pp. 2241-2243). Chapman & Cole filed a Motion for Sanctions on June 7, 1984. (Vol. 11, p. 2236). During the hearing that followed, Judge Black suggested that Hassell change her firm's procedure for responding to requests for production:

> You better change it promptly or *your law firm is going to be paying a lot of sanctions in this court.* That is totally ridiculous, that is, to make a lawyer charge his client, at a $150 an hour, whatever they charge, to come pick up documents, where they can mail them in reponses to request for production. . . .

(Vol. 13, pp. 7-8, emphasis supplied). The trial court did not grant any motions for discovery sanctions, but it did advise counsel that it would "not tolerate any unnecessary delay or needless increase in the cost of litigation." (*Id.*; Vol. 10, p. 2082).

During discovery, ITEL's counsel threatened Chapman & Cole's counsel and Ehrentraut with Internal Revenue Service investigations. (Vol. 13, pp. 6, 13). Counsel for Chapman & Cole and Ehrentraut raised the issue before Judge Black in the July 5, 1984 pretrial conference (*Id.*, pp. 6, 7, 13), but the court chose not to rule on the matter at that time. (*Id.*, p. 20). During that conference, Ehrentraut's counsel advised Urquhart & Hassell that Ehrentraut would be seeking Rule 11 sanctions. (Vol. 13, pp. 11, 18, 20). Judge Black said that he would carry the motion for sanctions. (*Id.*).

By December, 1984, Ehrentraut had appeared for a lengthy deposition, produced voluminous amounts of documentation reflecting his financial history, and allowed ITEL to examine numerous bank accounts, including those of his wife, his family and his business partners. Nevertheless, ITEL had still not been able to produce any evidence of kickbacks. As a result, ITEL filed a motion for extension of time to conduct discovery. (Vol. 10, p. 2053). In that motion, ITEL alleged that "additional evidence had been discovered that other contractors and employees of Chapman & Cole may have been involved in commercial bribery." (*Id.*, p. 2054). Judge Black responded by allowing ITEL to conduct additional discovery. Judge Black then transferred the case to Judge John Singleton. (Vol. 10, p. 1938).

During a subsequent deposition of Lester Schalit, Urquhart accused Schalit of taking kickbacks. (Vol. 3,

p. 527; Vol. 8, pp. 1651-1659; Vol. 16, pp. 470-475). Urquhart advised Schalit that Urquhart knew that Schalit had taken kickbacks. (*Id.*). Schalit vehemently denied giving or receiving kickbacks. (*Id.*). Schalit demanded that Urquhart tell him who had slandered him with allegations of bribery. Counsel joined in that request. (Vol. 18, pp. 1651-1659). Urquhart replied that Schalit and counsel would "find out at trial." (*Id.*, p. 1654). Urquhart then made the following admission to Mr. Schalit: "At this point I believe everything you have said. I don't believe for a moment that you have taken any kickbacks." (*Id.*, p. 1653). Schalit was also threatened with a lawsuit by ITEL's counsel if he did not cooperate. (Vol. 3, p. 527; Vol. 16, pp. 470-475).

After Urquhart had leveled his accusations of bribery against Schalit, Chapman & Cole propounded interrogatories to ITEL. (*Id.*, p. 1647). In Interrogatory No. 5, Chapman & Cole asked ITEL to identify the name, address and telephone number of any individual who had knowledge of or who had stated that Schalit took kickbacks during the construction of the ITEL facility. (*Id.*). At that point, counsel for ITEL answered "None. . . . Counsel for Defendant mistakenly believed that the comments of Mr. John Montgomery to Ms. Silvia T. Hassell regarding kickbacks taken by Mr. Norman Ehrentraut also included allegations of kickbacks taken by Lester Schalit." (*Id.*, p. 1657).

5. The trial court's rulings on dispositive motions and motions for Rule 11 sanctions during 1985 and 1986.

On March 25, 1985, Chapman & Cole filed a Motion for More Definite Statement Pursuant to Rule 9(b), or,

in the Alternative, to Dismiss Pursuant to Rule 12(b). (Vol. 10, p. 1927). Chapman & Cole argued that ITEL had failed to comply with Rule 9(b)'s specificity-in-pleadings requirement. (*Id.*). The trial court declined to grant the motion, and the case continued. (Vol. 9, p. 1841).

On April 24, 1986, Chapman & Cole filed another Motion to Compel Answers to Interrogatories in an effort to learn what facts, if any, allegedly supported ITEL's RICO and fraud claims. (Vol. 9, p. 1811). On May 5, 1986, Chapman & Cole filed another Motion to Compel Answers to Interrogatories. (*Id.*, p. 1776).

In 1986, Chapman & Cole and Ehrentraut sought to avoid further proceedings by filing motions for summary judgment. Chapman & Cole filed a motion for summary judgment on its breach of contract claim (Vol. 9, p. 1735) and a supporting memorandum brief. (*Id.*, p. 1709). On May 30, 1986, Chapman & Cole and Ehrentraut filed a joint motion for summary judgment on ITEL's RICO claims (*Id.*, p. 1701) and a detailed memorandum brief that summarized all of the evidence that ITEL had cited as support for its racketeering claims. (*Id.*, p. 1674).

On June 12, 1986, Chapman & Cole filed a motion to impose Rule 11 sanctions upon ITEL for filing and maintaining a frivolous RICO lawsuit. (Vol. 8, p. 1645). Ehrentraut filed a similar motion for Rule 11 sanctions on June 16, 1986. (*Id.*, p. 1467). In response, ITEL endeavored to raise fact issues that precluded the entry of a summary judgment. (Vol. 7, pp. 1432, 1288). The trial court declined to grant Chapman & Cole's and Ehrentraut's motions for summary judgment. (Vol. 6, p. 1073). The trial court also ordered that, "All motions

for sanctions are hereby DEFERRED and the court reserves the right to impose sanctions at the trial if it determines the RICO claim to be frivolous." (*Id.*, p. 1074).

In an August 4, 1986 pretrial conference (S.C.T. p. 8), the court reviewed the procedural and discovery disputes between the parties and advised Hassell that it was "very doubtful, or words to that effect, that [she] had any cause of action under RICO." (*Id.*). Hassell responded that "we have plenty of evidence." (*Id.*). The trial court asked Hassell to produce that evidence within sixty days; it was never produced. (*Id.*).

On October 16, 1986, Chapman & Cole filed its First Amended Motion for Sanctions. (Vol. 6, p. 1055). Chapman & Cole reminded the trial court that ITEL's counsel had stated during the August 4, 1986 pretrial conference that it was "absolutely necessary" for ITEL to take the deposition of Robert Treat a third time and for ITEL to obtain all of Treat's bank records. (Vol. 6, p. 1070). As a result of this representation, the trial court extended discovery until October 6, 1986. The trial court also allowed ITEL to take Treat's deposition for a third time and to obtain Treat's bank records from March 1980 through March 1981. (*Id.*). ITEL made that request even though there was never any formal allegation that Treat had paid any "kickbacks" to Ehrentraut or to any one else. During Treat's deposition, ITEL's counsel asked few if any specific questions about the voluminous bank records that had been produced. (*Id.*, p. 1070). No evidence of Treat's knowledge of the payment of kickbacks in the construction of the ITEL facility was produced during Treat's first, second, or third deposition. (*Id.*, p. 1070).

6. The trial court's rulings on discovery disputes and motions for sanctions in 1987.

During the final pretrial conference on January 5, 1987, the trial court carried Chapman & Cole's motions for Rule 11 sanctions until the time of trial. (Vol. 6, p. 1043). On April 6, 1987, Chapman & Cole filed its Motion for Discovery Sanctions pursuant to Rule 37 (Vol. 4, p. 1735), based upon ITEL's concealment of material Container Maintenance Service (C.M.S.)/ITEL correspondence. (*Id.;* Vol. 14, p. 8).

During the late afternoon of Friday, April 3, 1987 (the last business day before trial), ITEL filed its motion to dismiss its RICO claim against Ehrentraut. (Vol. 4, p. 758). *ITEL dismissed its RICO allegations with prejudice on the eve of trial even though it had previously opposed all dispositive motions concerning this cause of action.* (*Id.*). Before trial began, the court signed the Order of Dismissal with prejudice. (Vol. 4, p. 757).

7. Proceedings during trial.

Because of the dismissal of the RICO claim, the trial court stated that the parties should not present RICO related evidence. (Vol. 14, p. 24). Nevertheless, the trial court announced that it would look into the RICO allegations at the conclusion of trial in order to determine whether Rule 11 sanctions should be imposed against ITEL and its counsel. (Vol. 14, p. 23). The trial court specifically stated that "if I find that it is necessary at the conclusion of this trial to go into the sanctions on the RICO thing, I will do that. Okay?" The court stated that RICO evidence would be submitted later if necessary. Hassell agreed to the trial court's proposal with the response, "All right." (*Id.,* pp. 23-24).

During trial, Al Goldade, one of ITEL's designated representatives at the facility, testified that he had known Chapman to be an "honest" man and did not know him to conceal anything. (Vol. 17, pp. 670-675). Goldade denied knowledge of any facts that supported ITEL's allegations that Chapman had participated in acts of fraud, concealment and misrepresentations. (Vol. 3, p. 525; Vol. 17, pp. 670-675). This was the same Goldade who had previously signed sworn pleadings stating that Chapman had made fraudulent and deceptive misrepresentations. (*Id.*, pp. 526, 670-675; Plaintiffs' Tr. Ex. No. 61(g)). When confronted with the inconsistency, Goldade was literally dumbfounded and could not explain why he had signed the pleadings. (*Id.*). Nor could Goldade identify who told him to sign. (*Id.*). ITEL's trial counsel denied instructing Goldade to sign the verification, even though the pleadings were prepared on Urquhart & Hassell letterhead, and further denied ever speaking to Goldade about his answers. (*Id.;* S.C.T. p. 99). Poor Mr. Goldade was left dangling from a limb with no help from the Petitioner.

At the conclusion of trial, Chapman & Cole re-urged its previous motion for sanctions. (Vol. 20, pp. 1211, 1227). The trial court denied it. (*Id.*).

8. Post-trial sanctions proceedings.

On April 16, 1987, Chapman & Cole filed its Motion for Final Judgment (Vol. 3, p. 538) and its Motion to Reconsider Plaintiffs' Motion for Sanctions. (*Id.*, p. 525). Ehrentraut filed a Supplemental Motion for Sanctions under Rule 11 on April 22, 1987. (*Id.*, p. 407). After reviewing the extensive briefing by ITEL (Vol. 2, pp. 399, 375), the trial court issued a Notice of Setting

which scheduled a show cause hearing to determine whether sanctions should be imposed upon ITEL and its trial counsel. (Vol. 2, p. 372).

In preparation for the show cause hearing, ITEL obtained transcript excerpts of the trial testimony of numerous witnesses. (S.C.T. pp. 30-60; Vol. 2, pp. 370, 371, 388, 406). ITEL issued subpoenaes to Mongomery, Ehrentraut, and others who had already appeared and testified at trial under ITEL's earlier subpoenaes. (Vol. 2, pp. 360, 370, 371). Just before the show cause hearing, ITEL presented the court with an alleged tape recording of a conversation between Hassell and Montgomery that had taken place on June 9, 1983. (Vol. 2, p. 360). At the same time, ITEL filed its Motion for Protective Order with respect to the tape. (*Id.*). ITEL wanted the trial court to review the transcript of that conversation in an *in camera* proceeding. Chapman & Cole filed a Motion to Compel Production, but the trial court never ordered the tape to be produced. (*Id.*, p. 351).

Despite the fact that the tape and other similar information had been requested by Chapman & Cole several years before in interrogatories and requests for production, ITEL intentionally suppressed this information; ITEL did not disclose it to the trial court or to any of the parties. (Vol. 20, p. 1190). It was not until Urquhart and Hassell faced the threat of imminent sanctions at the close of trial that Urquhart and Hassell submitted this "evidence" to the trial court. (Vol. 20, pp. 1189, 1190).

The show cause hearing occurred on May 11, 1987, and the trial court took the motion under advisement. (Vol. 20, p. 273).

On June 17, 1987, the trial court issued its Findings and Conclusions. (*Id.*, p. 155).

On July 22, 1987, after two months of deliberation, the trial court entered an order imposing sanctions on ITEL and its counsel, jointly and severally, for violations of Rules 11, 26 and 37, Fed. R. Civ. P. (Vol. 1, p. 110).[2] The trial court entered its Final Judgment on August 10, 1987. (Vol. 1, p. 45).

The trial court granted ITEL's and Urquhart and Hassell's motion to stay enforcement of the (sanctions) Memorandum and Order on August 13, 1987. (Vol. 1, pp. 35-36).

In September, 1987, ITEL and its counsel ordered the Record and the Transcript of the Trial in reverse chronological order.[3] (Vol. 1, pp. 18-19).

ARGUMENT

I. THE SANCTIONS ORDERED JULY 22, 1987 WAS CORRECT.

In the sanctions hearing, the trial court challenged ITEL and its trial counsel to show that they made an objectively reasonable factual investigation before filing their RICO claim. The trial court explicitly relied upon the Fifth Circuit's ruling in *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987).

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2. The trial court's Memorandum and Order is attached to Petitioner's Brief as Appendix B.

3. ITEL's counsel prepared the record in reverse chronological order to obscure the absence of evidence that supported ITEL's fraud, DTPA and RICO claims when they were first pleaded early in the case.

Urquhart and Hassell argue that the trial court "erred as a matter of law by imposing sanctions . . . based upon an incorrect legal standard for objective reasonableness [sic.]" (Appellants' Brief at 33). According to Urquhart and Hassell, the trial court:

(1) "improperly engaged in hindsight analysis,"

(2) "misperceived" the "state of the trial record and ITEL's lack of success at trial,"

(3) "made an 'incorrect legal ruling on the concept of relevancy,' " and, worst of all,

(4) "required Urquhart and Hassell to maintain more than just a plausible . . . view of the facts and the law."

(Appellants' Brief, p. 33).

Petitioner's first contention that the trial court engaged in "hindsight analysis" must be dismissed. The trial court did not surprise Urquhart and Hassell by granting Chapman & Cole's and Ehrentraut's motions for sanctions. Long before Urquhart and Hassell dismissed ITEL's RICO case, the trial court judge had warned Urquhart and Hassell that he would impose sanctions if he found that the RICO lawsuit was frivolous. (Vol. 6, p. 1074; Vol. 14, p. 23; S.C.T., p. 8). The trial court's July 22, 1987 Memorandum and Order reflects its awareness of its duty to "delve into the attorney's initial thought processes" because "it would be unfair to use hindsight as the sole gauge in making such an evaluation." (Vol. 1, p. 120). The court avoided using the "wisdom of hindsight" under Rule 11. Advisory Committee Note, *Comments of the Advisory Committee on Rule 11, Fed. R. Civ. P.*, 97 F.R.D. 165, 199 (1983). A review of the Notice of Setting, the transcript of the Show Cause Hearing and the July 22, 1987 Memorandum and Order will

demonstrate that the court sought to learn what Urquhart and Hassell had known when they originally filed ITEL's RICO complaint. Thus, the trial court avoided the danger of hindsight analysis. (Vol. 1, p. 119).

Urquhart's and Hassell's claim that the trial court "misperceived the state of the trial record" is nothing more than a request that this Court re-try the case. That request for a retrial ignores the Supreme Court's directive that an appellate court's "function is not to decide factual issues *de novo*." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). A *de novo* review of the type requested by Urquhart and Hassell would reduce the trial court's seven day bench trial to a mere "tryout on the road." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Rather than "misperceiving" the trial record, the trial court reviewed the evidence and weighed the credibility of the witnesses. The trial court simply concluded that Urquhart's and Hassell's explanations were unbelievable. This Court should give due regard to the trial court's "opportunity to judge the credibility of witnesses." Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

II. THE TRIAL COURT DID NOT DENY ITEL THE RIGHT TO PRESENT EVIDENCE OF EHRENTRAUT'S ALLEGED ACTS OF "RACKETEERING".

A. The Trial Court Gave Urquhart and Hassell Every Opportunity to Develop and Introduce Evidence of Ehrentraut's Alleged Acts of "Racketeering."

ITEL has claimed that it was "persistently precluded from obtaining documentary evidence refuting or sup-

porting its RICO claim" (ITEL's Brief, p. 48) because "adverse parties obstructed ITEL in virtually every phase of discovery." (*Id.*, p. 46). ITEL believes that neither it nor Urquhart and Hassell should be sanctioned "merely because they did not yet possess all of the facts which full-scale discovery might have disclosed." (*Id.*, p. 46).

ITEL did engage in "full-scale" discovery. That discovery, included ten depositions, multiple sets of interrogatories and more than a dozen requests for production. It lasted four years and five months. ITEL and its counsel should not be heard to argue that Chapman & Cole, Ehrentraut or the trial court were responsible for the absence of facts that supported ITEL's RICO claim.

B. Urquhart and Hassell Waived the Opportunity to Introduce Evidence and Cross-Examine Witnesses and Failed to Make Offers of Proof at Trial.

Cross-examination offered Urquhart and Hassell an opportunity to attempt to prove that Ehrentraut and third party witnesses Montgomery, Schalit, Novotny and Treat were lying about their denial of the receipt of kickbacks during the construction of the ITEL facility. ITEL waived the right to exercise that opportunity by failing to cross-examine those witnesses on pertinent issues and by failing to impeach those witnesses' knowledge of Ehrentraut's alleged evil-doing.

At trial, Schalit testified that Hassell's investigator had threatened him with a lawsuit (Vol. 3, p. 473) and that Urquhart had accused him of being a bribe-taker. (*Id.*, pp. 470-471). Nonetheless, Urquhart stated that he had "no questions" for Schalit and did not cross-examine him. (*Id.*, p. 475; S.C.T. p. 37).

Petitioner failed to cross-examine Ehrentraut after he testified that ITEL's counsel had offered to drop the RICO claim against Ehrentraut if Ehrentraut would change his testimony (Vol. 5, p. 786) and after Ehrentraut had testified that Urquhart had threatened to subject him to an Internal Revenue Service investigation. (*Id.;* S.C.T. p. 11). Although Urquhart denied that he had threatened Ehrentraut with an I.R.S. investigation (Vol. 2, p. 377), Urquhart did not testify on the witness stand, verify that statement or file an affidavit to that effect with the trial court.

C. The Trial Court Gave Urquhart and Hassell Every Opportunity to Present Evidence of Ehrentraut's Alleged "Racketeering" at the May 11, 1987 Show Cause Hearing.

The trial court gave Petitioner every opportunity to present and argue the evidence that allegedly supported ITEL's RICO claims at the May 11, 1987 show cause hearing. Urquhart and Hassell claimed that they understood the role of the trial court's notice of setting (Vol. 2, p. 372) in determining the agenda of the hearing. (S.C.T. p. 3). The briefs and affidavits that ITEL's trial counsel filed and the testimony given at that hearing demonstrate that the trial court gave Urquhart and Hassell one last chance to explain their conduct. (Vol. 2, pp. 375, 319, 273, 274; S.C.T. p. 204).

III. THE TRIAL COURT'S JULY 22, 1987 ORDER IMPOSING SANCTIONS WAS CORRECT.

The trial court concluded that ITEL's management had condoned and encouraged war-of-attrition litigation tactics that were designed to "make it so costly that Chapman & Cole would be forced to give up without

a fight." (Vol. 1, p. 171; S.C.T. p. 111). The trial court's observation suggests that the Petitioner engaged in bad faith litigation tactics. Where a party or an attorney has " 'willfull[y] abuse[d] judicial process' or otherwise conducted litigation in bad faith," the district court has the inherent power to impose sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986). A violation of Rule 11 can occur if a paper is filed for an "improper purpose." *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 (5th Cir. 1987). *See also, Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 456 (9th Cir. 1987) (affirming sanctions against an attorney who had included an inflated demand for damages in an otherwise reasonable pleading, "based solely on the frivolousness and improper purpose underlying the damage claim"). This Court should affirm the trial court's sanctions decision because of Urquhart and Hassell's improper attempt "to bludgeon, with the corporate facilities of ITEL, the people who brought this lawsuit." (S.C.T. p. 6).

A. ITEL's RICO Complaint Was Not Well-Grounded in Fact, as Rule 11 Requires, When It Was Filed.

After an exhaustive analysis, the trial court concluded that the pre-filing investigation of ITEL's RICO Complaint was not an objectively reasonable means of ascertaining the truth under the circumstances. (Vol. 1, pp. 121-122). The court's sanctions order represents a reasonable and appropriate response to the unethical behavior of ITEL and its counsel.

The trial court's sanctions order is certainly supported by the facts. Petitioner failed to conduct an independent

investigation in order to learn the truth about the five check payments that allegedly constituted proof of Ehrentraut's "pattern of racketeering activity." (S.C.T. p. 66). *The trial testimony of Ehrentraut and Novotny established that the Dan Tex checks were payments for legitimate work that Ehrentraut had performed on construction projects other than the ITEL facility.* (Vol. 1, pp. 122, 123; Vol. 16, pp. 525-531; Vol. 3, p. 530).

Assuming, *arguendo,* that Petitioner really believed that the witnesses who testified about Ehrentraut's work on other Chapman & Cole projects were all liars, ITEL's counsel failed to conduct an objectively reasonable investigation in order to determine whether Ehrentraut's receipt of those checks constituted the receipt of kickbacks. (Vol. 7, p. 1381).

A reasonable attorney who wanted to learn whether a December 17, 1980 check bearing the notation "comm'n on Rucker Tire" was evidence of the payment of a kickback would have taken the depositions of the most disinterested witnesses, namely, the Rucker Tire Company officers who employed Dan Tex Erectors and Ehrentraut in late 1980. (Vol. 7, p. 1381; Vol. 2, p. 251). *Testimony from a Rucker Tire Company employee denying that Ehrentraut had worked on a Rucker Tire project would have constituted circumstantial (as opposed to speculative) evidence that the December 17, 1980 check was a kickback.*

If Rucker Tire Company witnesses could have corroborated ITEL's claims, Urquhart and Hassell would have obtained their testimony. Likewise, Urquhart and Hassell could have investigated the Bevis, Wellhead, Seaboard and Texfin jobs. (Vol. 16, p. 526). *Had they*

bothered to investigate, Urquhart and Hassell would have learned that Ehrentraut legitimately worked as an independent contractor for Novotny "after hours" on weekends, on other jobs for legitimate pay. (Vol. 1, p. 122; Vol. 16, pp. 525-531).

A party who fails to explore readily available avenues of inquiry should be sanctioned for filing a factually frivolous lawsuit. *Caloway v. Marvel Entertainment Group,* 111 F.R.D. 637, 646-647 (S.D. N.Y. 1986) (counsel's failure to consult an expert prior to making claims of forgery and tampering). Similarly, an attorney who restricts her factual investigation to cursory telephone inquiries instead of personal interviews fails to conduct a reasonable pre-filing investigation. *Wold v. Minerals Engineering Co.,* 575 F. Supp. 166, 167 (D. Colo. 1983) (sanctions imposed upon an attorney whose "limited telephone inquiries did not meaningfully address the relevant facts").

Urquhart and Hassell nevertheless maintain that they had good grounds to call Ehrentraut a racketeer. ITEL's trial counsel urge this Court to believe that Ehrentraut had a duty to advise Chapman of his relationship with Novotny. Assuming, *arguendo,* that Ehrentraut should have advised Chapman that he had obtained part-time after-hours legitimate employment on the Texfin, Seaboard Wellhead, Bevis and Rucker Tire jobs, that employment did not relate to the ITEL facility. (Vol. 18, pp. 774-776). Even if it had related to the construction of the ITEL facility, *ITEL's counsel never made any attempt to show how Novotny (a slab/building contractor) could have caused Ehrentraut (Chapman & Cole's employee) to "look the other way" while Treat (a dirt contractor) prepared the flexible surface at the ITEL*

facility. Treat and Novotny performed different jobs on the site, did not know one another, and had never conducted business together. (Vol. 3, p. 529; Vol. 15, p. 193; Vol. 16, p. 579). Treat also lost money on the job. (Vol. 15, p. 201). Nonetheless, ITEL alleged that Novotny paid the kickbacks to Ehrentraut although its trial counsel never provided a credible explanation for this implausible scenario. (Vol. 20, p. 2198).

B. Urquhart and Hassell Misled the Trial Court about the "Evidence" that Allegedly Supported ITEL's Frivolous RICO Claim.

At the August, 1986 pretrial conference, the court told Hassell that it was "very doubtful" that ITEL had a cause of action under RICO. (S.C.T. p. 8). Hassell told the trial judge that she had "plenty of evidence." (*Id.*). The trial judge gave Urquhart and Hassell sixty (60) days to produce that evidence. (*Id.*). None was ever produced, however. (*Id.*). Thus, the trial court concluded that it had been misled when Urquhart and Hassell implied that discovery had produced new evidence to support ITEL's RICO claim.

C. Urquhart and Hassell Intentionally Concealed Material Evidence in Violation of Rules 26 and 37, Fed. R. Civ. P.

1. Urquhart and Hassell Concealed a Transcript of a Surreptitiously Taped Telephone Conversation with Third Party Witness John Montgomery.

Interrogatory No. 5 in Chapman & Cole's Fifth Set of Interrogatories to ITEL specifically requested the

identification of "all of the documents, records, memoranda, written indicia and evidence" which supported ITEL's claims that Ehrentraut had solicited and received commercial bribes from subcontractors involved in constructing the ITEL facility. (Vol. 1, p. 131; S.C.T. pp. 105-107). The trial court ruled that the tape recording of Hassell's June 1983 telephone conversation with Montgomery fell within the scope of Chapman & Cole's interrogatories. (*Id.*, pp. 131-135).

ITEL's answers to Chapman & Cole's interrogatories were incomplete because they failed to advise the parties and the court that ITEL was withholding a transcript of a surreptitiously taped telephone conversation with Montgomery. (*Id.*, p. 134). Urquhart and Hassell have claimed that this tape provided the factual basis for the Counterclaim and RICO Complaint. (*Id.*, pp. 118-119). Thus, Urquhart and Hassell have admitted that the transcript was relevant to the facts of the case under the standard of relevancy enunciated in Rule 401, Fed. R. Evid. and in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1318 (5th Cir. 1985) (en banc), the two authorities for the concept of relevancy cited in Urquhart and Hassell's Brief. (Appellants' Brief, p. 41).

IV. URQUHART & HASSELL SHOULD BE SANCTIONED FOR CONTINUING TO PURSUE THIS MATTER.

Urquhart & Hassell's Petition for a Writ of Certiorari contains a distortion of the underlying facts and of the course of proceedings below. Petitioner is still attempting to "bludgeon" Chapman & Cole "into submission" as Judge Singleton stated. They still have more money than

common sense. Unfortunately, Respondents are still having to pay for this character flaw.

Therefore, Urquhart & Hassell should be further sanctioned for filing a frivolous Petition for a Writ of Certiorari with this Court. *In re Ginther,* Sub. 91 F.2d 1151 (5th Cir. 1986), the court imposed sanctions against the party and against counsel for filing a frivolous appeal of an Order through which the trial judge had dismissed a meritless fraud/rico/conspiracy case. The court imposed a sanction of double costs against the Appellant and counsel. *Id.* at 1155-56. This Court should remand this case to the trial court so that it can calculate the additional amount of attorneys' fees that has been caused by this frivolous petition. When an appeal is frivolous and features misrepresentations of precedent, appellate sanctions are in order. *In re Itel Sec. Litig.,* 791 F.2d 672, 676 (9th Cir. 1986). Under the circumstances of this Petition, it would be appropriate for this Court to impose a similar sanction upon Urquhart & Hassell.

CONCLUSION

Chapman & Cole and C.C.P., Ltd. pray that this Court will affirm the ruling of the Fifth Circuit Court of Appeals and that the District Court be affirmed, that Urquhart & Hasell's Petition for a Writ of Certiorari be denied, that additional sanctions be imposed against the Petitioner for filing a frivolous Petition and that this case be remanded to the trial court so that it may calculate the additional amount of attorneys' fees and costs incurred by the Respondents as a result of the filing of a frivolous

Petition and for such other and further relief, both at law and in equity, to which it may be justly entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served upon all counsel of record by certified mail, return receipt requested, on this the 15th day of August, 1989.

_____

J. DOUGLAS SUTTER

REP

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PLY

EF

NO. 89-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

URQUHART & HASSELL,
Petitioner

v.

CHAPMAN & COLE, C.C.P., LTD. AND
NORMAN EHRENTRAUT,
Respondents

PETITIONER'S REPLY TO CHAPMAN & COLE AND C.C.P., LTD.'S RESPONSE

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PETITIONER'S REPLY TO CHAPMAN & COLE AND C.C.P., LTD.'S RESPONSE

Urquhart & Hassell, petitioner, hereby replies to Chapman & Cole and C.C.P., Ltd.'s response to petitioner's certiorari petition:

I. Petitioner's Reasons for the Grant of Certiorari Have Neither Been Denied Nor Refuted.

Respondents neither deny nor refute petitioner's three pronged rationale for the grant of certiorari in this civil action. Instead, respondents prematurely attempt to argue the alleged "merits" of the lower courts' imposed sanctions *without* addressing the petitioner's recited cardinal criteria for a certiorari grant: (1) the fatal variance

between Rule 11's textual standard for sanctions and the lower courts' "adopted substitute" standard for sanctions, (2) the conflict among the circuit courts of appeal regarding the standard for appellate review of Rule 11 sanctions orders, and (3) the absence of an adequate appellate review in this case. Thus, Respondents present no opposition to this Court granting certiorari to resolve and to remedy the variances, conflicts and absence of adequate appellate review presently plaguing Rule 11 jurisprudence in this civil action and in the circuits.

II. Certiorari is Mandated to Insure a Normative, Rational Application of Rule 11 and Respondents' Response Demonstrates a Species of Non-Normative, Capricious Application of Rule 11 Which Eviscerates Rule 11's Salutary Function of Deterring Baseless Litigation Without Chilling Zealous Advocacy.

Respondents' response prematurely argues the perceived "merits" of the lower courts' decisions. The determination of the actual merits of the lower courts' decisions must await a grant of certiorari and complete briefing on the substantive, non-certiorari issues. This premature discussion, however, presents certain examples of a contorted Rule 11 analysis by divination which by contradicting Rule 11's text, by trivializing any functional standard of appellate review and by eviscerating Rule 11's function to deter baseless allegations without discouraging zealous advocacy, are reasons for and not against a certiorari grant. Respondents' response, therefore, demonstrates the need for this Court's rehabilitation of the Rule 11 sanctions process by restoring primacy effect to Rule 11's textual balance of deterring baseless claims without chill-

ing zealous advocacy through emphasis on an attorney's belief grounded in an objectively reasonable pre-filing investigation.

A. Respondents' Response Relies Upon an Internal Contradiction Which Precludes a Rational Application of Rule 11.

Respondents' response extolls a Rule 11 decisional oxymoron devised by the district court and affirmed by the Fifth Circuit. It asserts that the district court properly avoided a hindsight post-filing review of petitioner's pre-filing inquiry by analyzing petitioner's pre-filing inquiry by the post-filing trial transcript. (Respondents' Response, page 16). It refers to the following passages from the district court's sanctions order (which are reproduced here because respondents' response fortuitously deletes key words and the context regarding such passages):

> In addition to the authority granted the Court by the rule itself, the defendant's attorneys are also aware that this Court retained jurisdiction during two pretrial conferences to impose sanctions if the allegations proved to be baseless. In fact, this Courts' [sic] exact words during those conferences were that sanctions "would be imposed" if these allegations *proved* to be false. (116 F.R.D. at 552) (emphasis added).
>
> *It is difficult for a Court to evaluate the sufficiency of an attorney's inquiry prior to filing a claim. Such an evaluation requires the Court to delve into the attorney's initial thought processes.* For this reason it would be unfair to use hindsight as the *sole* gauge in making such an evaluation. Therefore, *in this case* the the [sic] Court must evaluate Ms. Hassell's actions *in light of the Fifth Circuit's adopted standard:* was Ms. Hassell's decision to bring the RICO claims

> objectively reasonable under the circumstances. (116 F.R.D. at 554) (citations omitted) (emphasis added).
>
> To evaluate the sufficiency of Ms. Hassell's inquiry *one need look no further than the trial transcript.* (116 F.R.D. at 555) (emphasis added).

This approach fatally varies from Rule 11's textual requirement that ". . . the district court must focus on what was reasonable for an attorney *to believe at the time the pleadings were filed,* not on what the court *later finds* to be the case." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938, 941 (11th Cir. 1989); *Threaf Properties, Ltd. v. Title Insurance Co. of Minnesota,* 875 F.2d 831, 835 (11th Cir. 1989). (Emphasis added). It is necessary for this Court to correct this approach which is at variance with Rule 11's text.

B. Respondents' Response Does Not Require a Rule 11 Analysis to be Bound by Normative Guidelines Except Judicial Caprice.

Respondents also argue for an unprincipled imposition of sanctions pragmatically unreviewable by any appellate courts. This results in the potential for unwieldly judicial caprice, internally inconsistent arguments and incomplete arguments: a potential realized in each instance in this civil action. It is impossible in the available space to highlight each error in this regard set forth in respondents' response and such an analysis is reserved for the full briefing in this matter in the event certiorari is granted. Certain errors, however, require addressing at this time, because they highlight the need for certiorari in this case to protect Rule 11's integrity of deterring baseless litigation without deterring zealous advocacy.

1. Respondents' Response Eschews Factual Accuracy and Completeness and Raises Issues Respondents Failed to Sustain in the Lower Courts.

Respondents' response is not based upon an accurate or complete factual narrative. Respondents' approach apparently derives from the Fifth Circuit's assumption, without basis, that some sanctions awards are less "substantial" and are deserving of a lesser review. 865 F.2d at 687. All imposed sanctions affect an attorney's reputation and thus are substantial, and the following paragraphs detail examples of how respondents' response equates this lesser review with no review or an unprincipled review whereby the lower courts' decisions may be supported by no real basis.

Respondents' response truncates petitioner's pre-filing inquiry, assumedly because this is the only way to try to support the lower courts' decisions. Petitioner's certiorari petition details, at pages 4-5, an exhaustive list of pre-filing discovery, which respondents' response, at its caprice, summarizes as a cursory telephone call: a telephone call, whose own transcript was part of the record and available to both lower courts, contradicts respondents' characterization of it as lacking any inquiry into dates, persons and time. It addresses no reason why it, or the lower courts, failed to address the interplay between each of the pre-filing matters set forth at petitioner's certiorari petition at pages 4-5 and the resulting beliefs derived therefrom: a point poignantly avoided because such a full review would contradict the erroneous results of this truncated approach.

Respondents' response devotes one major division of its discussion (Section II) to explain that petitioner never

produced evidence of the RICO violations at trial. Besides being a point irrelevant to the pre-filing investigation conducted and the belief formed therefrom, it ignores a seminal fact: the RICO case was never tried, having been settled before trial. Respondents' response does not deny this point, but it is forced to ignore it because the alleged absence of RICO evidence at trial underpinned the district court's backward progression "analysis" of why it believed no basis existed for the RICO claim when filed.

Respondents' response paints an incomplete record of respondents' discovery motions and omits necessary motions filed by Itel. As to respondents' motions, however, all the motions listed were either denied by the court or withdrawn by respondents except for one motion to compel production of documents dealing with timely objections raised by Itel regarding confidential corporate financial information, which objections were sustained in part. Respondents' response conspicuously obscures *the results* of the motions, because the startling defeat or withdrawal rate undermines the intended impact suggested by respondents incomplete narrative that it was forced to file its prolific motions as a result of discovery abuse. The defeat and withdrawal rate shows with contemporaneous evidence that no discovery abuses were found to exist. In a similar manner, respondents' response relates a colloquy between Judge Norman Black and counsel wherein, although admitting that respondents' discovery motion was denied, recites that Judge Black admonished petitioner alone that the court would not tolerate unnecessary delay or needless litigation costs. (Respondents' Response at pg. 7-8). The quoted portion of Judge Black's order was incomplete because the complete text shows that it was directed to *both* counsel and not to

petitioner as suggested by respondents' characterization at pages 7-8. (R. 2082).

Respondents' response paints a colorful, but inaccurate, portrait of one witness, Al Goldade. In an emotional appeal, respondents portray Al Goldade as having been victimized by petitioner. Respondents' response fails to mention that respondents did not appeal the district court's ultimate holding that it was legally proper for Al Goldade to verify interrogatory answers, as a corporate representative, despite having no personal knowledge of the facts set forth in the interrogatory answers. (See Appendix pages 48a through 50a.) Al Goldade, then, was not left ". . . dangling from a limb . . . ," but was planted firmly on proper legal ground as ultimately determined by the district court.

Respondents' response curtly asserts that petitioner misled the district court. Again, respondents cite no fact finding because the lower courts did not and could not make such a finding. Petitioner repeatedly presented two district courts with its evidence which formed its objectively reasonable pre-filing inquiry and belief in the RICO claim prior to a pretrial conference held in August of 1986. That evidence contained the "plenty of evidence" alluded-to by petitioner. Further, that evidence, as presented by petitioner to Judge Singleton prior to August of 1986, was sufficient in the district court's opinion to defeat the motions for summary judgment on the RICO claim filed jointly by respondents and Ehrentraut. Whether that evidence was enough to prove the RICO claim at trial is unresolved as the RICO claims were never tried. However, the evidence of the RICO claims was at least sufficient to survive all pretrial motions, including a Rule 11 motion filed

in 1984 for the filing of the RICO claim. Also, whether, as respondents' response concludes at page 6, Judge Black never commented on the RICO claim's *proof* is also unresolved. The probative value of this evidence, *which is a post-filing determination,* is not relevant to petitioner's pre-filing inquiry and resultant belief. Judge Black's denial of Rule 11 sanctions, *at the time of the original filing of the RICO claim,* on the other hand *reflects a contemporaneous ruling* of the propriety *of the Rule 11 belief, after reasonable inquiry,* of the RICO claim: a ruling that should not have been challenged later by Judge John V. Singleton.

Respondents' factual narrative unfettered by accuracy and completeness results from its disassociation with any normative, analytical framework and from an implicit assumption that such narrative should be rubber-stamped on appeal. This Court should grant certiorari to resolve this dilemma which pragmatically precludes any effective appellate review and trivializes Rule 11's text and purpose.

And, just as an example of the bewildering lengths to which respondents will go to taint any review, and as evidence of the lack of factual basis underlying the prolific motions for sanctions filed by respondents, at footnote 3, page 15, respondents claim that petitioner ". . . prepared the record in reverse chronological order to obscure the absence of evidence that supported Itel's fraud, D.T.P.A. and RICO claims . . ." The footnote cites no lower court fact finding, because none was made. It also does not explain to this Court that the record reflects that it was ordered and prepared in the district clerk's ordinary manner. It also further conveniently deletes reference to the district court's fact finding

that the D.T.P.A. claim was proper:[1] a fact finding significantly avoided by respondents because no rationale exists why petitioner's discovered facts, which, in part, legally gave rise to a belief, formed after inquiry, in both the D.T.P.A. and RICO claims, could form an objectively reasonable basis, as found by the district court, for the D.T.P.A. claim but not also form an objectively reasonable basis, as found by the district court, for the RICO claim. It is important to note that the district court's finding regarding the D.T.P.A. claim was based upon the district court's *consideration of "evidence relied upon"* and demonstrates, again, the lower court's erroneous reliance on trial evidence rather than any pre-filing inquiry and ensuing belief as mandated by Rule 11. While petitioner agrees that the filing of the D.T.P.A. cause of action did not merit the imposition of sanctions, a decision respondents did not appeal, petitioner questions the standard used by the lower courts in reaching such an inconsistent conclusion.

2. Respondents' Response Eschews a Rational Interplay Between the Facts and the Law.

Respondents' response also assumes that the factual narrative need *not* be evaluated in terms of the legal predicate for the RICO claim. It queries, at page 22, how petitioner's factual, pre-filing inquiry could have been reasonable in light of the facts actually discovered. However, it does not evaluate such inquiry in light of peti-

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1. The fact finding that the D.T.P.A. claim filed by petitioners which was based, in part, on the same facts forming the basis of the RICO claims, states as follows:

> This Court has *considered the evidence* relied upon by Ms. Hassell in bringing the Texas Deceptive Trade Practices Act claims and finds, given the broad scope of the statute, that Ms. Hassell's actions in bringing those claims does not warrant an imposition of sanctions. (R. 138) (Emphasis added.)

tioner's stated prima facie elements of Texas commercial bribery (which comprised the RICO predicate acts). This procedure is flawed because respondents have *never, nor has any lower court ever,* refuted petitioner's legal analysis of Texas commercial bribery, and, if such an unrefuted analysis obtains (as it must), then the very scenario which respondents call implausible (at pages 21-23) could be Texas commercial bribery. If it could be, then petitioner had a reasonable belief formed after an objectively reasonable inquiry. This approach conforms to Rule 11's text, provides a normative basis to review the facts and the pre-filing inquiry and allows for an economical, efficient review *de novo* or otherwise of the total record evaluated through the prima facie elements of the claim. Respondents' diffuse approach is the antithesis of this succinct approach. This Court should grant certiorari to restore some normative parameters for Rule 11 decisions. This appeal by petitioner is a bona fide attempt to undo the damage it has been caused by the erroneous decisions of the lower courts.

Petitioner prays that its petition for a Writ of Certiorari be granted and that the decisions of the lower courts be reversed.

Respectfully submitted,

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